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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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08/967,473

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THEODORE G. HABING

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EXAMINER

CROW, STEPHEN R

ART UNIT

PAPER NUMBER

3764

MAIL DATE

DELIVERY MODE

12/30/2008

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Advisory Action
Before the Filing of an Appeal Brief

Application No.

08/967,473

Applicant(s)

HABING ET AL.

Examiner

Steve R. Crow

Art Unit

3764

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 10 December 2008 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.
b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.
Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☒ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☒ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☒ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☒ Applicant's reply has overcome the following rejection(s): The art rejection of Miller in view of Breunig (claims 34-35).
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☒ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
The status of the claim(s) is (or will be) as follows:
Claim(s) allowed: 1,2 and 7-9.
Claim(s) objected to: _____.
Claim(s) rejected: 3-6,10-17 and 19-35.
Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☐ The request for reconsideration has been considered but does NOT place the application in condition for allowance because: _____.
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). _____
13. ☒ Other: See Continuation Sheet.

/Steve R Crow/
Primary Examiner, Art Unit 3764

Continuation of 13. Other: In response to Applicant's remarks:

(1) According to 37 CFR 1.175 (b)(1) and the MPEP:

A supplemental oath/declaration need not be submitted with each amendment and additional correction. Rather, it is suggested that the reissue applicant wait until the case is in condition for allowance, and then submit a cumulative supplemental reissue oath/declaration pursuant to 37 CFR 1.175 (b)(1).

Accordingly, the supplemental Oath can wait until all other matters are resolved and the case is in condition for allowance.

(2) For purposes of Appeal, the amendments to claims 3, 20 and 25 will be entered. These claims were rejected for the first time under 112, and are now considered corrected. The rejection no longer applies. The Final rejection is maintained.

The response filed 12-10-08 implies that the Patent Examiner is responsible for the many years of delay. There are several reasons why there have been delays which were not caused by the examiner. Waiting until the defective oath is corrected is another delay to be expected in the future.

(3) Once the Oath is the only remaining obstacle to allowance, the decision on the deficiencies of the Oath, in consultation with the SPRE unit, will be conducted.

The Examiner does believe that the Reissue application's Oath cannot refer to an error which doesn't appear in the claims, e.g., the regulated and unregulated language in the Oath. Furthermore, stating a boilerplate type reason, such as "the patent did not claim invention in terms that Rodgers did" lacks any degree of specificity.

(4) The Attorney's footnote on page 14 is not understood.

"The Patent Examiner further asserts that it is improper to state in the declaration that the errors were due to claim language absent in the parent applicant and that the declaration must address an error in which the parent claims were too limiting, pointing out that limiting structure. (Office Action, page 4 (emphasis added)) As discussed more fully below, this is not the case as the claims can properly be broadened in this application and Rule 1.175(a)(1) allows such a reissue if the "patentee [claimed] more or less than the patentee had the right to claim in the patent. (emphasis added)".

The Examiner respectfully believes that the cause (too limiting) is being confused with the solution (broadening the claims). In other words, the Applicant must state why the claims are too limiting so as to permit broadening of the claims.

(5) With respect to the Lockable crank: The Drawings do not show any locking structure for achieving the lockability of the cranks. Figure 3 is not a schematic.

Applicant states, "However, the recitation of the lockable crank was clearly set forth in the original application as filed at page 3, lines 9-11 and pages 11 lines 1-4. Further, the configuration and operation of the locking embodiment were clearly in possession of the inventor, as evidenced by the discussion in the latter passage: "If the crank assembly is locked in position, the vertical linkage arms remain stationary (preferably with both arms parallel) and the only exercise movement possible is vertical movement of the horizontal linkage arms 32', 34', thereby providing a simulation of stair climbing." Further still, lockable cranks were known before applicant's filing date (see, e.g., U.S. Patent 4,841,757), so that the express reference to a lockable crank assembly would have been sufficient written description to enable one of ordinary skill in the art to practice the claimed invention."

The locking feature has not been clearly discussed in the Specification. The Specification contemplates locking the crank assembly, but grossly fails to provide any structure whatsoever for achieving a locking status of the crank assemblies. Stating that "lockable cranks were known before applicant's filing date (see, e.g., U.S. Patent 4,841,757)" during prosecution is not permissible to correct this written description concern.

The art rejection of claims 33-34 as being unpatentable over Miller in view of Breunig has been withdrawn.

(6) Factually, claim 1 is not generic. Claim 1 recites that the device has a crank assembly. Figure 1 has a pulley and transmission assembly. The problem regarding alternative embodiments arises because claim 6 recites that the biasing means comprises a spring. This spring is not depicted in the figure 3 embodiment. It is unclear how the claim 6 spring structure and the claim 1 crank assembly structure exist is the same embodiment. How do these structures coexist?

(7) The level of ordinary skill in the art is that of an artisan who works in the art. Absent a C.V., the Examiner cannot with specificity state what the exact level of skill is. But the level of general skill in the exercise art is suggested by the "footprints" of patents in that art, e.g., all of the patents in the Exercise field represent the skill of the artisan in the art.

Respectfully submitted,